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238718—53——1

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 559

UNITED STATES OF AMERICA, PETITIONER

v.

AMERICAN CONSTRUCTION CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above cause on October 7, 1952.

OPINION BELOW

The opinion of the Court of Claims (R. 28–35) is reported at 107 F. Supp. 858.

JURISDICTION

The judgment of the Court of Claims was entered on October 7, 1952 (R. 35). On December 29, 1952, by order of Mr. Justice Jackson, the time

for filing a petition for a writ of certiorari was extended through January 25, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

1. Whether Section 307 of the President's Regulations under the Lucas Act—barring recovery under that Act without a finding that the contractor would have been entitled to equitable relief under the First War Powers Act—is invalid.

2. Whether Section 204 of the President's Regulations—barring recovery under the Lucas Act of claims on which "final action * * * was taken on or before August 14, 1945"—is invalid.[1]

STATUTES AND EXECUTIVE ORDER INVOLVED

The pertinent provisions of the War Contract Hardship Claims Act (The Lucas Act), 60 Stat. 902, as amended, 62 Stat. 992, 41 U. S. C. (Supp. V) 106 note, and of the President's regulations

[1] If certiorari is granted, we reserve the right to urge that the claims filed by respondent amounted to claims of right and were not sufficient to apprise the War Department that extra-legal relief under the First War Powers Act was being sought. See *infra*, pp. 3–6. However, we do not rely on this as a reason for granting certiorari, for it is based upon a factual analysis of the meaning of the parties' conduct in the particular circumstances of this case.

In the court below, the Government also urged that the action was barred under the six-month period of limitations fixed by the Lucas Act; but we do not rely on this as a ground for granting certiorari, nor do we expect to urge it if certiorari is granted.

promulgated under the Act, Executive Order 9786, 11 F. R. 11553, are set forth in the Appendix, *infra*, pp. 20–24.

STATEMENT

This is an action under the Lucas Act for relief from losses incurred by the respondent in the performance of war-time construction contracts with the War Department. Respondent's net losses of $59,768.42 arose from its contract for the construction of McCloskey General Hospital at Temple, Texas (F. 1, 2, R. 16). Several separate items of loss are involved. The facts, as found by the Court of Claims, relating to these items and to respondent's war-time claims to the War Department upon which its petition for Lucas Act relief is based,[2] are as follows:

(1) The first war-time claim, involving two items, centered around respondent's allegations (a) that the contracting officer had improperly required respondent to increase its working force and to maintain the force overtime, and (b) that the contracting officer refused to give proper credit for excusable delays. On March 25, 1943, respondent made its claim for these items to the contracting officer (F. 5, R. 17). The contracting officer denied the claim, and respondent appealed

[2] Actions under the Lucas Act are limited to "losses with respect to which a written request for relief was filed" with the appropriate agency "on or before August 14, 1945" (*infra*, p. 22). See *Fogarty* v. *United States*, 340 U. S. 8.

to the War Department Board of Contract Appeals (F. 6, R. 19–20). The Board's decision with reference to the item for the increased number of workmen and for the unnecessary overtime was issued on January 28, 1944 (F. 6, R. 19–20). The decision treated the claim as one for breach of contract and held that the Board lacked power to award damages for such breaches. It went on to state that the Board did not decide whether respondent was entitled to extra-contractual relief under the provisions of the First War Powers Act, which permitted amendment or modification of the contract. With respect to the allegations concerning the item for excusable delays, the Board held a hearing and denied the claim on the merits (F. 6, R. 19–20).

(2) The second claim involved respondent's allegation that it had suffered loss from the Government's delay in staking out lines and grades for curb and gutter construction. This claim was filed on January 18, 1943. It, too, was denied by the contracting officer, and again, on appeal to the Board of Contract Appeals, it was treated as a claim for breach of contract and as such was rejected on November 25, 1944 (F. 7, R. 20–21).

(3) The third claim was based on allegations that the Government had, in violation of the changes and termination articles of the contract, deleted from the contract certain road work, on

which much of respondent's profit depended (F. 8, R. 21–22). As will appear, the Army dealt with this claim in two separate ways: first, as a claim for breach of contract, and, second, as a claim for extra-contractual relief under the First War Powers Act. Respondent filed this claim on November 17, 1942 (F. 8, R. 21–22). The contracting officer also denied this claim, and the respondent appealed (F. 8, R. 21–22).

While the appeal was pending, negotiations were instituted by the Army for the compromise of this claim (F. 9, R. 22–23). These negotiations proceeded to a point where the respondent signed and sent to the Army for final approval a proposed supplemental agreement, designated "Modification No. 47", which recited that it was executed under the First War Powers Act and "would facilitate the prosecution of the war," as required by that Act (F. 10, R. 23). However, higher echelons of the Army disapproved the proposed agreement. At the same time, the contracting officer was instructed to negotiate further with a view to seeking a compromise allowing respondent a reasonable profit on the road claim "in accordance with Article 23 of the contract" (F. 10, R. 23). Respondent, however, continued to seek a renegotiation of the whole contract. The contracting officer insisted that any modification be limited to the deleted part of the work (F. 10, R. 23).

No further action having been taken on the proposed agreement, the Board of Contract Appeals made its decision on November 22, 1944, rejecting the contention that deletion of the road work was a breach of the contract (F. 11, R. 23–25).[3] Respondent's request for a modification under the First War Powers Act, if such a request was made, had borne no fruit by V-J day, August 14, 1945.

In 1947, respondent filed a timely claim under the Lucas Act with the Army (F. 13, R. 26). The War Contract Hardship Claims Board subsequently denied the claim on the ground that no proper request for relief under the First War Powers Act had been filed by August 14, 1945, as required by the Act and by this Court's decision in *Fogarty* v. *United States,* 340 U. S. 8 (F. 14, R. 27–28). Respondent then brought this action in the Court of Claims.[4]

The Government contended that the various claims filed by the respondent during the war amounted to claims as of right, under the contract, and were not sufficient to apprise the Army that extra-legal relief under the First War Powers Act was being sought. It also urged that under the President's executive regulations, authorized by the Lucas Act, the claims were barred,

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[3] A motion for reconsideration of this decision was denied on January 30, 1945 (F. 11, R. 23–25).

[4] An earlier suit in a federal District Court was dismissed because in excess of $10,000 (R. 28).

first, because they were not claims for which respondent would have been entitled to relief under the equitable standards established pursuant to the First War Powers Act, as required by Section 307 of the regulations (*infra,* p. 24), and, second, because final action had been taken by the Army on the claims, so that they were barred by Section 204 of the regulations [5] (*infra,* p. 24). The Court of Claims rejected both contentions. It held that, although the claims contained language which sounded like an assertion of contractual rights, they were sufficient to apprise the Army that extra-legal relief was being sought. It disposed of the contention that respondent had not complied with the President's regulations by summarily holding that both Section 204 and Section 307 of the regulations were invalid on their face, on the authority of its decisions in *Howard Industries, Inc.* v. *United States,* 113 C. Cls. 231, and *Jardine Mining Co.* v. *United States,* 115 C. Cls. 279. The court allowed the full amount of respondent's net loss, without finding that relief would have been granted under the First War Powers Act if final action with respect thereto had been taken by the War Department on or before August 14, 1945.

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[5] The Government also contended that the action was barred by the Lucas Act Statute of Limitations, but we do not urge this as a ground for granting certiorari. See fn. 1, *supra,* p. 2.

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REASONS FOR GRANTING THE WRIT

Underlying the specific questions presented by this case is the basic issue of the meaning and purpose of the Lucas Act. As in *Fogarty* v. *United States,* 340 U. S. 8, we read the Lucas Act as expressing the limited objective of affording relief to contractors whose claims would have been entertained under Section 201 of the First War Powers Act (55 Stat. 838, 839, 50 U. S. C. App. 611), had the claims not been administratively barred by the fortuitous end of hostilities on August 14, 1945. The Court of Claims, on the other hand, reads the Act as providing far "broader relief than was contemplated by the First War Powers Act." *Howard Industries, Inc.* v. *United States,* 113 C. Cls. 231, 238.

This opposition of views squarely calls into question the validity of Section 307 of the President's regulations, issued under the authority delegated by Section 1 of the Lucas Act (*infra,* p. 20), barring claims under the Act unless it is administratively found by the war agency that "relief would have been granted under the First War Powers Act, 1941, if final action with respect thereto had been taken by the war agency on or before August 14, 1945." Also called into question is Section 204 of the regulations, barring claims on which "final action * * * was taken on or before that date [August 14, 1945]"; for the view taken by the court below, permitting the reopening of re-

quests for relief denied during hostilities, not only affords additional relief to war contractors whose First War Powers Act claims were actually entertained, but also means that the Lucas Act broadens the standards upon which relief will be granted beyond those applied under the First War Powers Act.

One or the other of these questions is present in every one of the 61 cases now pending under the Lucas Act.[6] The second question was before this Court in *Fogarty* v. *United States,* 340 U. S. 8, but the Court found it unnecessary to reach this issue because the contractor had not complied with the Lucas Act's procedural prerequisite of having filed a written claim for First War Powers Act relief during the period of hostilities. The construction given to the Lucas Act by the court below is contrary to this Court's clear statement, in *Fogarty,* of the meaning and purpose of the law, and thus to the rationale of *Fogarty* itself.

1. The reasons for our view of the limited reach of the Lucas Act have been set forth in detail in the Government's brief in *Fogarty* v. *United States,* No. 6, October Term, 1950, to which the Court is respectfully referred, and in the Court's

[6] There are 48 Lucas Act cases pending in the Court of Claims and 13 in the district courts. In all of the 48 Court of Claims cases and in 10 of the 13 district court cases, the Government has, as one of its defenses, made the contention that there was no compliance with Section 307 of the regulations. In 32 of the 48 Court of Claims cases and 11 of the 13 district court cases, Section 204 can be asserted in bar.

opinion in that case. We summarize them briefly here. As the Court pointed out in its opinion, Congress was moved by a situation in which some war contracting agencies continued after the end of hostilities to process claims for equitable relief under the First War Powers Act, "while others took the position that" the Act was "no longer applicable, since the war was over and contract modifications could not 'facilitate the prosecution of the war.'" 340 U. S. at 11–12. The Lucas Act aimed at removing a fortuitous and discriminatory barrier against some claimants whose requests for relief were still in the "administrative pipeline" on V-J Day. The presentation of the measure to Congress by its sponsors and by the committees comprised an enunciation of this objective.

The removal of this inequality among claimants clearly required standards for the granting of relief no broader than those under the First War Powers Act. Under that Act, definite administrative standards were applied; and, although the standards were liberal, a claimant had always to show grounds of equitable entitlement. Under the view taken by the court below, the Lucas Act goes far beyond remedying the "disparity of treatment of claimants for the relief of the [First War Powers] Act whose claims had been filed but not acted upon before August 14, 1945" (340 U. S. at 12). A drastic new inequality is created,

discriminating against those contractors whose requests for relief were handled under the First War Powers Act standards, and opening the way for an entirely unintended use of the Lucas Act as a guarantee against losses regardless of their source, so long as the contractor was free of fault or negligence. By its reading, therefore, the court below has denied significance to this Court's enunciation, in *Fogarty,* of the meaning of the Lucas Act.

The terms of the Lucas Act embody the limited legislative objective of continuing a First War Powers Act type of relief for claimants caught by V-J day. Congress expressed its purpose, as the Court pointed out in *Fogarty* (340 U. S. at 12–13), by putting repeated stress on terms such as "equitable claims" (Section 1), "fair and equitable" (Section 2), and "the equities" (Section 6). These equate the Lucas Act with the construction of the earlier statute, for the latter also involved purely "equitable" claims—*i. e.,* those which were not demandable as of right. More specific implementation of the purpose of the Lucas Act was delegated, in Section 1, to the President, in whom had been reposed the authority to control relief under the earlier statute.

2. Recognition of the true purpose of the Lucas Act makes the validity of the President's regulations clear.

a. Section 307 of Executive Order No. 9786 (*infra,* p. 24) embodies in so many words the

intended limitation upon the scope of relief, *i. e.*, that relief would have been awarded under the First War Powers Act. The court below, arguing that the Lucas Act is broader than the executive construction contained in Section 307,[7] relied on the fact that the Lucas Act dropped the requirement in the First War Powers Act that relief must "facilitate the prosecution of the war." This argument fails to recognize that explicit reference to that requirement was dropped primarily because of the stricter construction given it, after the termination of hostilities, by some agencies which felt that very few types of relief could then be characterized as aiding the prosecution of the war. The court also relied on the provision of Section 2 of the Lucas Act that consideration should be given to action under the Renegotiation Act, the Contract Settlement Act of 1944, and similar Acts. This reliance is misplaced; prior action under those Acts might affect the amount of relief under the Lucas Act (as it might affect the amount of relief under the First War Powers Act), but it would not change the standards for determining whether claims are equitable. Finally, the court relied on some of the

[7] The arguments relied on by the court are set forth in its opinion in *Howard Industries, Inc.* v. *United States*, 113 C. Cls. 231 (reaffirmed in *Jardine Mining Co.* v. *United States*, 115 C. Cls. 279), on the authority of which it granted relief below. Both the *Howard Industries* and *Jardine Mining Co.* decisions were rendered before this Court decided the *Fogarty* case.

earlier legislative history of the Lucas Act, particularly an early version of the bill which spoke of preventing "manifest injustice", a provision which was subsequently amended to authorize the settlement of "equitable claims". But the "manifest injustice" language was dropped by Congress merely because it was regarded as ambiguous, and the court's argument ignored all the later legislative history of the bill, relied on by this Court in *Fogarty*. See, *e. g.*, 92 Cong. Rec. 9092; S. Rept. No. 1669, 79th Cong., 2nd Sess., p. 3; H. Rept. No. 2576, 79th Cong., 2nd Sess., pp. 1–2.

b. Section 204 of the regulations (*infra*, p. 24) likewise implements the legislative purpose. It bars the reopening of claims on which final action was taken under the First War Powers Act by August 14, 1945. It thereby limits relief to those whose requests for relief under the First War Powers Act had not been processed by V-J day, one of the fundamental objectives of the Lucas Act. The court's reading would support a wholesale reopening of claims previously disposed of, making the Lucas Act an unprecedented and unintended vehicle for guaranteeing contractors against all losses not caused by their own fault. In voiding Section 204, in addition to the arguments used in its attack on Section 307, the Court of Claims relied on the proviso of Section 3 of the Lucas Act (*infra*, p. 22), that "a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall

not operate to preclude further relief otherwise allowable under this Act." The short answer is that this proviso was inserted, we believe, to cover those cases, of which Congress was given a suggestion, where (1) a contractor held several contracts and had previously received relief on some but not others, (2) a contractor had previously received relief on a contract and later found it necessary to request further relief, or (3) a request for relief had been approved in part but final action was pending as to the rest. It was probably thought advisable to preclude the administering agencies from denying Lucas Act relief automatically in these types of cases. But the proviso was not designed to permit the reopening of a previous grant or denial of the very same request relied upon by the contractor for Lucas Act relief, and it is not worded in that sense. If Congress had intended to assume the potential liability and to impose the enormous administrative burden called for by such a reopening of all relief requests already determined—as well as to adopt the consequent extraordinary and discriminatory guarantee against wartime losses—it surely would have used plainer language, and the history of the Lucas Act would reveal some indication of that expanded purpose.[8]

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[8] A more detailed discussion of Section 204 of the regulations is contained in the Government's brief in the *Fogarty* case (Oct. Term, 1950, No. 6), at pp. 48 *et seq.*

3. If the President's regulations were far less clearly consonant with the meaning of the Lucas Act than they are, there would be every reason to uphold their validity. The President was authorized by the Act to issue them, and we think that the authorization, going beyond a mere power to prescribe procedural rules, included a delegation of legislative power. The rules were promulgated by the President himself, in an Executive Order, and such delegated actions of the "chief magistrate of the Union" (see *Martin* v. *Mott,* 12 Wheat. 19, 28–33) have long been afforded a special presumption of validity. Weight should also be given the fact that Executive Order No. 9786 constitutes a contemporaneous interpretation of the statute by the President, who plays an integral role in the legislative process. In addition, there are helpful guides in the ordinary presumption of administrative validity and the maxim that the statute, being gratuity legislation, must be strictly construed. But, beyond all this, the clear function of the disputed paragraphs of the Executive Order in implementing the basic purpose of the Act indicates that any attempt to treat them as inconsistent with law is erroneous.

4. a. Since the court below held that Sections 204 and 307 of the regulations were invalid, it did not consider whether their requirements had been met. Under its view of the law, it was able to enter judgment against the Government without

any consideration of whether, on the facts, the respondent was equitably entitled to relief, as the concept of equitable entitlement came to be defined under the First War Powers Act. Accordingly, its judgment cannot stand, since there has been no showing or finding of compliance with Section 307 of the Executive Order. The court erred in failing either to remand the case to the Army for the necessary findings (which we believe to be the proper course), or, at the least, to make the findings itself on the record before it.

In the present state of the record, it is improbable that the facts would have justified equitable relief under the First War Powers Act. The findings show only that the respondent suffered net losses without fault or negligence of his own. They neither draw nor require the conclusion that affirmative equitable grounds existed for granting any relief, and certainly do not show that such grounds existed for permitting recovery of respondent's entire net losses. For example, the proposed First War Powers Act compromise agreement, which the Army rejected, arose from respondent's contention that it had lost profits because of the deletion of a profitable portion of his contract. The Lucas Act expressly forbids relief from "diminution of anticipated profits" (Sec. 1, *infra,* p. 20), yet the court gave no indication of how much its award was influenced by the Army's rejection of the proposed compromise.

Again, the Lucas Act (Section 2 (a), *infra*, p. 21) fixes the amount of a claimant's net losses as a ceiling on the amount of recovery, thus clearly permitting an award of less than the full amount. Yet the court awarded the full amount without determining whether the Army's standards required reducing the award to some percentage less than 100 per cent of this amount. In short, the court has treated the Lucas Act as a vehicle for insuring the respondent against its full losses of the contract, without regard to equitable considerations or the relief which would have been granted under the First War Powers Act.

b. It is likewise clear, once the validity of Section 204 of the regulations is recognized, that this section also bars recovery. The Army took "final action" before August 14, 1945, on each of the three claims involved. With respect to the first two claims, relating respectively to the augmented work force and the alleged excusable delays and to the curb and gutter work, final action consisted in the Board of Contract Appeals' denial of the claims (see *supra*, p. 4). With respect to the road work claim, the final action consisted in the rejection of the proposed settlement under the First War Powers Act and in the subsequent denial of the respondent's claim as of right (see *supra*, pp. 4–6).

Respondent suggested in the court below that rejection of the claims as of right does not

amount to final action, because the Board of Contract Appeals pointed out in its opinions that it was not passing on the question of whether First War Powers Act relief was available. This line of argument places respondent in the inconsistent position of urging that its claims were sufficient to apprise the Army, for the purpose of Section 3 of the Lucas Act (see *Fogarty* v. *United States,* 340 U. S. 8, 13), that it was seeking First War Powers Act relief, while simultaneously relying, for the purpose of showing compliance with Section 204 of the regulations, on the Army's reading of these claims as claims of right. Moreover, we think the argument is incorrect. Despite the Army's hint that First War Powers Act relief might be available, respondent took no action for periods ranging from almost seven to nine months before the end of hostilities. The Army took no further action; and we think that its denial of the claims, taken together with its unaccepted hint to respondent, amounts to a holding by it that, unless respondent took further steps, the administrative action was final.

The situation is similar with respect to the road work claim. Negotiations had taken place for settlement of this claim, and we think it clear that the Army's rejection of the proposed "Modification No. 47" constituted final action, unless respondent's renewed request for negotiations reopened the claim. But we think that the Army's

insistence that any negotiations be confined to the road claim, in the face of respondent's requests for reconsideration of the entire contract, made it clear that as a practical matter no further action would be taken.

But, apart from our analysis of the particular facts of this case, the crucial point is that the Court of Claims, on the basis of its reading of the statute, has denied the administrative agency an opportunity to make its own analysis of the facts in the light of its administrative standards and has also refused to make such an analysis itself. This ruling will apply, unless corrected, to all 48 pending Lucas Act cases in that court (see fn. 6, *supra*, p. 9). Upon this erroneous reading, contrary to the Lucas Act's legislative history, to the President's executive interpretation, and to the rationale of the *Fogarty* case, the court below has predicated a large judgment in this case, and built the foundation for many future judgments, against the Government.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WALTER J. CUMMINGS, JR.,
Solicitor General.

JANUARY 1953.

APPENDIX

1. The Lucas Act (Act of August 7, 1946, 60 Stat. 902, 41 U. S. C. 106 note) read in pertinent part:

AN ACT

To authorize relief in certain cases where work, supplies, or services have been furnished for the Government under contracts during the war.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where work, supplies, or services have been furnished between September 16, 1940, and August 14, 1945, under a contract or subcontract, for any department or agency of the Government which prior to the latter date was authorized to enter into contracts and amendments or modifications of contracts under section 201 of the First War Powers Act, 1941 (50 U. S. C., Supp. IV, app., sec. 611), such departments and agencies are hereby authorized, in accordance with regulations to be prescribed by the President within sixty days after the date of approval of this Act, to consider, adjust, and settle equitable claims of contractors, including subcontractors and materialmen performing work or furnishing supplies or services to the contractor or another subcontractor, for losses (not including diminution of anticipated profits) incurred between September 16, 1940, and August 14, 1945, without fault or negligence on their part in the performance of such contracts or subcontracts. Settlement of such claims shall be made or approved in each case by the head of the department or agency con-

cerned or by a central authority therein designated by such head.

SEC. 2. (a) In arriving at a fair and equitable settlement of claims under this Act, the respective departments and agencies shall not allow any amount in excess of the amount of the net loss (less the amount of any relief granted subsequent to the establishment of such loss) on all contracts and subcontracts held by the claimant under which work, supplies, or services were furnished for the Government between September 16, 1940, and August 14, 1945, and shall consider with respect to such contracts and subcontracts (1) action taken under the Renegotiation Act (50 U. S. C., Supp. IV, app., sec. 1191), the Contract Settlement Act of 1944 (41 U. S. C., Supp. IV, sec. 101–125), or similar legislation; (2) relief granted under section 201 of the First War Powers Act, 1941, or otherwise; and (3) relief proposed to be granted by any other department or agency under this Act. Wherever a department or agency considering a claim under this Act finds that losses under any such contract or subcontract affected the computation of the amount of excessive profits determined in a renegotiation agreement or order, and to the extent that the department or agency finds such amount was thereby reduced, claims for such losses shall not be allowed under this Act.

(b) Every claimant under this Act shall furnish to the department or agency concerned any evidence within the possession of such claimant bearing upon the matters referred to in subsection (a) of this section.

SEC. 3. Claims for losses shall not be considered unless filed with the department

or agency concerned within six months after the date of approval of this Act, and shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945, but a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act.

* * * * *

SEC 6. Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with any Federal district court of competent jurisdiction, asking a determination by the court of the equities involved in such claims; and, upon the filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled (not exceeding the amount which might have been allowed by the department or agency concerned under the terms of this Act) and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court; and thereafter either party may appeal from the decision of the court as in other equity cases.

2. Section 37 of the Act of June 25, 1948 (62 Stat. 869, 992), revising 28 U. S. C., amended Section 6 of the Lucas Act to provide:

Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either

granting or denying his claim, such claimant shall have the right within six months to file a petition with the Court of Claims or, if the claim does not exceed $10,000 in amount or suit has heretofore been brought or is brought within thirty days after the enactment of this amendatory act, with any Federal district court of competent jurisdiction, asking a determination by the court of the equities involved in such claim; and upon the filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled (not exceeding the amount which might have been allowed by the department or agency concerned under the terms of this Act) and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court; and thereafter either party may appeal from the decision if it was rendered by a district court or petition the Supreme Court for a writ of certiorari if it was rendered by the Court of Claims, as in other cases. Any case heretofore brought in a district court under this section may, at the election of the petitioner to be exercised within thirty days after the enactment of this amendatory Act, be transferred to the Court of Claims for original disposition in that court.

3. Executive Order No. 9786, dated October 5, 1946, 11 F. R. 11553, issued pursuant to the Lucas Act, provides in pertinent part:

* * * * *

SEC. 204. No claim for loss under any contract or subcontract of a war agency shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; and no claim shall be considered if final action with respect thereto was taken on or before that date.

* * * * *

SEC. 307. Relief with respect to a particular loss claimed shall not be granted under the Act and these Regulations unless the war agency considering the claim finds, or, in case such loss was incurred under the contracts and subcontracts of another war agency, such other war agency finds, that relief would have been granted under the First War Powers Act, 1941, if final action with respect thereto had been taken by the war agency on or before August 14, 1945.

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OCTOBER TERM, 1952

No. 559

UNITED STATES OF AMERICA, *Petitioner,*

v.

AMERICAN CONSTRUCTION CO.

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 559

UNITED STATES OF AMERICA, *Petitioner,*

v.

AMERICAN CONSTRUCTION CO.

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

This is a case brought under the Lucas Act (Act of August 7, 1946, 60 Stat. 902, as amended 62 Stat. 869, 992, 41 U. S. C. 106 Note), which Act authorizes war agencies to settle equitable claims of contractors for losses on war contracts incurred without fault or negligence on their part provided the contractor on or prior to V-J Day (August 14, 1945) had filed a written request for relief with

the agency involved. It is undisputed that Respondent had filed claims with the War Department prior to V-J Day in connection with a contract which it performed for the construction of McCloskey General Hospital upon which it sustained an undisputed loss (F. 1-4, R. 16-17). The War Department had refused to grant Respondent relief under the contract, but the Board which did so specifically held that no authority under the First War Powers Act had been delegated to it (F. 6, R. 19). However, prior to V-J Day the War Department had proposed a settlement under the First War Powers Act, which Respondent by executing a written contract agreed to accept (F. 9, 10, R. 22-23). Higher authorities in the War Department refused to approve the settlement and returned the matter to its District Engineer for further negotiation (F. 10, R. 23). These negotiations had borne no fruit by V-J Day (F. 11, R. 23-25).

Respondent filed a timely claim under the Lucas Act which was refused by the War Department (F. 13, 14, R. 26-27) and Respondent then brought the matter before the Court of Claims under that portion of the statute which provides that if a contractor is dissatisfied with the action of the agency upon his claim he has the right to file a petition in the Court of Claims for a determination of the "equities involved" and "the Court, sitting as a Court of Equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled * * *." The Court of Claims on October 7, 1952, held that Respondent had fully complied with the Lucas Act and was equitably entitled to $59,768.42 (R. 16-35). It is from this judgment that Petitioner is now applying for a writ of certiorari, contending that the decision of the Court of Claims is in violation of Sections 204 and 307 of Executive Order 9786, 11 F.R. 11553.

STATUTES INVOLVED

The Lucas Act and the provisions of the Executive Order which Petitioner claims are involved are set forth as an appendix to the petition for certiorari and they will not be repeated herein, except as pertinent to the argument hereinafter made.

QUESTIONS PRESENTED

1. Whether Sections 204 and 307 of Executive Order 9786 are now applicable to the case at bar so that their validity may be adjudicated in the event this writ is granted.

2. Whether Sections 204 and 307 of Executive Order 9786 are valid, if applicable.

3. Whether the matters involved are of sufficient public concern to warrant the allowance of the writ under Rule 38(5).

REASONS WHY PETITION SHOULD BE DENIED

This petition for certiorari has been filed for the sole purpose of having this Court pass upon the validity of Sections 204 and 307 of Executive Order 9786, 11 F. R. 11553. Respondent says that the petition should be denied for the following reasons:

I. Under the fact findings of the Court of Claims upon *uncontradicted* evidence the portions of the Executive Order relied upon are not applicable and their validity accordingly cannot be adjudicated should the writ be granted. Furthermore, Petitioner did not except to the pertinent findings nor request further findings upon which to base an appeal.

II. The provisions of the Executive Order relied upon are so patently in conflict with the statute that their invalidity is obvious.

III. The questions involved are not of sufficient general importance to warrant the granting of the writ.

The foregoing reasons will now be separately discussed.

ARGUMENT

I.

Under the Fact Findings of the Court of Claims Upon Uncontradicted Evidence the Portions of the Executive Order Relied Upon Are Not Applicable and Their Validity Accordingly Cannot Be Adjudicated Should the Writ Be Granted. Furthermore, Petitioner Did Not Except to the Pertinent Findings Nor Request Further Findings Upon Which to Base an Appeal.

Since this point involves the facts it will be necessary to consider in some detail the Lucas Act, the background of Respondent's claims, and the findings made by the Court below. Briefly stated, the Lucas Act (Act of August 7, 1946, 60 Stat. 902, as amended 62 Stat. 992, 41 U.S.C. 106 Note) authorizes war agencies to settle *equitable* claims of contractors for losses on war contracts incurred without fault or negligence on their part provided the contractor on or prior to V-J Day (August 14, 1945) had filed a written request for relief with the agency involved.[1]

This Court has upon one prior occasion considered the Lucas Act, *Fogarty* v. *United States*, 340 U. S. 8 (1950). This Court there construed the meaning of that portion of the statute limiting it to losses "with respect to which a written request for relief was filed * * * on or before August 14, 1945" and set up a test for determining whether a claimant could come under the Act. The test prescribed was as follows:

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[1] The statute further provides that if the contractor is dissatisfied with the action of the agency upon his claim he has the right to file a petition in the Court of Claims (or Federal District Court depending upon the amount involved) for a determination of the "equities involved" and "the Court, sitting as a Court of Equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled * * *."

> " * * * No particular form of notice is required. But whatever the form of notice, it must be sufficient to apprise the agency that it was being asked to grant extra-legal relief under the First War Powers Act for losses sustained in the performance of war contracts."

The foregoing test prescribed by this Court imposes upon the Trial Court the burden of determining a question of fact, that is, was or was not the form of notice sufficient to apprise the agency it was being asked to grant extra-legal relief under the First War Powers Act. In passing upon Respondent's case the Court of Claims clearly recognized its duty, made specific findings of fact in Respondent's favor, such finding being summarized in the Court's opinion as follows:

> "Before plaintiff can recover under the Lucas Act, however, it must show that there was a 'written request for relief * * * filed * * * on or before August 14, 1945 * * * ' within the meaning of the Lucas Act, and that such request was sufficient to apprise the War Department that it was being asked to grant extra-legal relief from such losses. Fogarty v. United States, 340 U.S. 8.
>
> "Plaintiff has submitted documentary evidence of several written claims filed with the Government during the period in question, and contends that these documents encompass a written request for extra-legal relief sufficient under the Lucas Act.
>
> " * * *
>
> "We have quoted in our findings portions of these documents which support plaintiff's contention that there was a sufficient request filed with the War Department, and it is unnecessary to restate them here. There is little doubt, however, that in total effect they constitute a request for extra-legal relief from plaintiff's losses under the contract.
>
> "We have also noted in our findings that for a period of several months during the pendency of plaintiff's administrative appeal * * * defendant favorably con-

sidered modification of the contract by a supplemental agreement which recited it was executed pursuant to the First War Powers Act, * * *.

"* * * Considering in their entirety the documents upon which plaintiff relies, we hold that there was a written request between September 16, 1940, and August 14, 1945, within the meaning of the Lucas Act, and sufficient under the Fogarty decision to apprise the War Department that it was being asked to grant extra-legal relief for losses suffered by plaintiff under the hospital contract." (R. 33-35.)

From the foregoing it is apparent that the Court of Claims has determined the fact issue prescribed by the Fogarty case in Respondent's favor. It is the contention of Respondent that the fact findings of the Court of Claims further preclude the applicability of Sections 204 and 307 of the Executive Order. Such findings are upon uncontradicted evidence and are entitled to acceptance here. *United States* v. *Esnault-Pelterie*, 303 U. S. 26, 28-29 (1938); *United States* v. *Causby*, 328 U. S. 256, 268 (1946).

A. The Inapplicability of Section 204 of the Executive Order

Petitioner principally relies upon Section 204 of the Executive Order and contends that final action had been taken upon Respondent's requests for relief before August 14, 1945. The Executive Order provides as follows:

"Sec. 204. No claim for loss under any contract or sub-contract of a war agency shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; and no claim shall be considered if final action with respect thereto was taken on or before that date."

It is important to determine the meaning of final action. Final action upon what? It is significant to here note that the Lucas Act as originally introduced contained this limitation:

> "*Provided further,* That this Section shall not be applicable to cases submitted under Section 201 of the First War Powers Act, 1941, which have been finally disposed of *under such Section upon their merits*[2] prior to August 14, 1945."[3]

Although the foregoing limitation was deleted entirely from the Lucas Act as passed, an attempt at reinstatement was made in Section 204 of the Executive Order; however, in view of the fact that the only final disposition ever considered by Congress was a final disposition upon the merits *under the First War Powers Act* obviously the Executive Order contemplated no more than this, i.e., the disposition must have been *under the First War Powers Act.* Furthermore, the Executive Order provides "final action with respect thereto," referring to the "request for relief". Since this Court has held in the Fogarty case that a "request for relief" means a request for *extra-legal relief under the First War Powers Act* it cannot be seriously contended that the Executive Order has any application unless it can be shown that in the case at bar there was a final determination *under the First War Powers Act* prior to August 14, 1945. The decisive point, therefore, is: Did the Court of Claims find as a fact that the request for extra-legal relief had been disposed of *under the First War Powers Act?* Respondent says that it found to the contrary. Defendant (Petitioner) filed no exceptions to the pertinent findings of fact, nor did it request additional findings of fact. (Defendant's Exceptions to the Commissioner's Report and Brief, pp. 57-59, Original Record, Court of Claims).

In order to determine whether there was a disposition of the claim for extra-legal relief under the First War Powers Act it will be of considerable assistance to consider the methods used by the Government agencies in dispensing

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[2] Throughout, unless otherwise noted, emphasis has been added.

[3] S. 1477, 79th Cong., 1st Sess.; for the complete language of the original bill see hearings before a Sub-Committee of the Committee of the Judiciary, U. S. Senate, 79th Cong. 2nd Sess., on S. 1477, p. 1.

such relief together with the legislative history of the Lucas Act.

When hearings were held before the Senate Committee on the Lucas Act the War Department sent Colonel Park Holland, Chairman of the Department's Contract Relief Advisory Committee, which considered cases arising under the First War Powers Act, as its representative. At such time Colonel Holland pointed out definitely the type of cases where the War Department granted relief under the First War Powers Act. His exact testimony was as follows:

> "You see, during the war we divided cases into, roughly, three classes. Definite hardship cases, where we needed to maintain a contractor in business to prosecute the war, it did not particularly matter whether he was unable to go on through his own fault or the Government's fault. We needed him, and handed out whatever money was essential for that purpose.
>
> "Another class was where a contractor *suffered a loss through definite acts on the part of the Government.* Perhaps this road situation might be analogous. (The witness was here referring to the case of Enjay Construction Company which had been detailed for the Committee. The contractor was informed by the War Department's engineer that the roads on the project would be completed in time for use by the contractor; however, this was not true and the contractor sustained losses because of the difficulty of performing the construction work without roads available on the project.)
>
> "Another case was where a contractor relied on a specific promise of people that should have been able to or had the authority to carry them out."[4]

At the same hearings the Navy Department put into evidence its directive setting forth the scope of relief under Executive Order 9001, which was the order implementing the First War Powers Act. The pertinent portion of the directive was as follows:

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[4] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Cong. 2nd Sess., on S. 1477, p. 56.

"In making recommendations with respect to applications for amendments or modifications, contracting officers should be governed by the following general interpretation of the scope of Executive Order 9001 which will be applied by the Office of Procurement and Material:

"First, Executive Order 9001 permits only such amendments and modifications which will facilitate the prosecution of the war.

"Second, the continued productivity of essential producers of war materials is, as a general rule, necessary to facilitate the prosecution of the war, and amendments or modifications without consideration are clearly justifiable to the extent necessary to prevent impairment of such productive ability.

"Third, fair and honest treatment of war contractors will assist in inducing wholehearted cooperation on the part of such contractors, and applications for amendments or modifications without consideration *to relieve contractors from loss* (not merely diminution of anticipated profit) *due to obvious errors and mistakes or due to Government action may be regarded with liberality* in respect of contractors essential to the war effort.

"Fourth, carelessness and looseness on the part of the contractors, however, cannot be encouraged and overwhelming generosity to careless contractors, no matter how great the risk of inducing some lack of cooperation, will not facilitate the prosecution of the war.

(Signed) Forrestal, Acting"[5]

The foregoing shows positively that it was the policy of both the War Department and the Navy Department to grant relief under the First War Powers Act where a contractor had sustained a loss due to Government action. The fact findings of the Court of Claims establish both that it was relief of this type for which Respondent applied

[5] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Cong. 2nd Sess., on S. 1477, p. 75.

and that there had been no final determination with respect thereto *under the First War Powers Act.* The following findings of the Court of Claims are conclusive upon this matter:

(a) In Finding 5 (R. 17-19) the Court of Claims found that plaintiff filed a claim in which it "contended that the contracting officer required plaintiff to increase the number of workmen and their hours of employment but that this action did not accelerate the completion of the contract; that the delays were caused by bad weather conditions and the operation of the Government's priorities and allocations program, and that the extra expense plaintiff was compelled to incur for labor costs was unnecessary and could have been avoided * * *." The Court quoted the concluding portion of the claim which read as follows:

> "'It is the claimant's belief that it is not the policy of the United States Government to have a portion of the cost of the project borne by the Contractor, especially *when the loss incurred by the contractor was due solely to the contractor having to abide by the unreasonable dictations of the Area Engineer or his subordinates, which brought about conditions beyond the contractor's control.*'"

By its 6th Finding (R. 19-20) it specifically pointed out that this claim was not disposed of under the First War Powers Act because it was referred by the War Department to its Board of Contract Appeals, and the Court of Claims quoted a portion of the opinion of the Board of Contract Appeals in which the Board affirmatively held that it had no delegated authority under the First War Powers Act, the pertinent portion of the finding quoting the Board's opinion being as follows: "Whether such power exists under Executive Order 9001 and the First War Powers Act, it is unnecessary here to determine, *as authority under that Act has not been delegated to this Board* (appeal of Wikstrom, B C A No. 96)."

(b) By its 7th Finding (R. 20-21) the Court of Claims found that plaintiff filed a written request in which it "claimed that the *Government's delay* in staking out the lines and grades caused plaintiff to *sustain a loss*" and the Court further specifically demonstrated that this claim was not disposed of under the First War Powers Act by pointing out that it was passed on only by the Board of Contract Appeals, which Board had no authority to grant War Powers relief, this being the same Board which the Court found under Finding 6 (R. 19) had no delegated authority under the First War Powers Act.

(c) By its 8th Finding (R. 21-22) the Court of Claims found that the plaintiff filed a claim based upon the deletion of certain road work from its contract in connection with which it "contended that the deletion of the road work deprived it of the items on which it could have made a profit and left plaintiff with the curb work which it completed *at a loss*" with an overall loss on the contract. The Court quoted the following portions of plaintiff's claim: "The Government has no right to exclude a portion of the work under our contract, which portion could have been executed by us at a profit, and require us to complete the balance of the work at the contract prices and at a *considerable loss*. This refers not only to the curb and gutter, which were a portion of the road work, but were left in our contract, but also to the balance of the entire project. * * * The loss on the whole contract has been approximately $80,000. * * * Wherefore * * * we pray that you review the record and the facts and correct the errors and mistake of the contracting officer * * *. We ask that you give the matter your earnest consideration and render a just decision so that our loss on the job may be reduced * * *." By its 11th Finding (R. 25) the Court of Claims affirmatively demonstrated that this claim was not disposed of under the First War Powers Act in as much as it was passed upon by the Board of Contract Appeals, which Board by Finding 6 (R. 19) was affirmatively found to have had

no delegated authority under the First War Powers Act. Furthermore, by Finding 10 (R. 23) the Court of Claims found that at one time the Government, through the War Department's Division Engineer, agreed to an allowance of $44,944 upon plaintiff's claim and plaintiff signed an agreement for acceptance which agreement specifically "recited that it had been determined that the execution of the agreement would facilitate the prosecution of the war and that such agreement was executed pursuant to the First War Powers Act and Executive Order 9001." The Court further found that the Chief of Engineers "returned the supplemental agreement without approval and with instructions to *negotiate further* * * *." By its 11the Finding (R. 23-24) the Court quoted from a letter written by plaintiff to demonstrate that plaintiff attempted to extend these negotiations to its entire loss, such portion of the Findings being as follows: " 'If there is to be a further renegotiation it should be of the *entire contract* including not only this claim in reference to road construction but also the other claims we have filed with you, and *which are still pending*, and also such *other portions of the entire contract on which we sustained losses* but for which no claims have been filed. *In the performance of the whole contract we sustained a serious loss.* * * *' " Plaintiff and the defendant had come to no agreement when the war ended on August 14, 1945.

(d) The Court of Claims removed any doubt whatsoever as to whether there had been a final disposition of plaintiff's request for extra-legal relief under the First War Powers Act by Finding 17 (R. 28) in which the Court found: "Neither the War Contract Hardship Claims Board nor any other representative of the War Department made any finding with respect to whether relief would have or would not have been granted under the First War Powers Act, 1941, *if final action with respect to plaintiff's claims had been taken on or before August 14, 1945.*" It should be specifically noted that the Court did not find "when final

action was taken" but *on the contrary* found "if final action had been taken." This is certainly an affirmative finding, completely supported by the record, that there had been no final action on plaintiff's request for extra-legal relief before August 14, 1945.

Since the foregoing findings were made upon uncontroverted evidence they are determinative of the issues in question. *United States* v. *Esnault-Pelterie,* 303 U. S. 26, 28-29 (1938); *United States* v. *Causby,* 328 U. S. 256, 268 (1946). Since the Court of Claims affirmatively found that there had been no final determination under the First War Powers Act Section 204 of the Executive Order, relied upon by Petitioner as a basis for certiorari, has no application. Its validity, therefore, cannot be adjudicated even if the writ is granted.

In its Petition the Government takes the position that Respondent's contention that its request for extra-legal relief was undisposed of places it in the inconsistent position of urging that its claims were sufficient to apprise the Army that it was seeking First War Powers Act relief while simultaneously relying upon the fact that the Army treated the claims differently when it referred the same to the Board of Contract Appeals. Respondent fails to see the inconsistency. In the first place it was the Army, *not Respondent,* that referred the claims to the Board of Contract Appeals (see Pltf.'s Ex. 5, pp. 52, 58, Unprinted Record). If there is any inconsistency such originated with the Army because, as the Court of Claims has found, in addition to referring the matter to the Board of Contract Appeals the Army *also* caused plaintiff to execute an agreement for settlement which specifically provided that it was under the First War Powers Act. (F. 10, R. 23). Furthermore, and more important, the legislative history of the Lucas Act demonstrates that it was not uncommon for the war agencies when they desired to grant relief to consider both the possibility of granting relief under the contract and the possibility of relief under the First War

Powers Act. The legislative history of the Lucas Act demonstrates that it was never intended that a determination that relief would not be granted under the contract should constitute a final disposition in so far as the First War Powers Act was concerned. The dividing line between relief under the contract and under the First War Powers Act was a very thin one. The War Department accorded relief "where a contractor suffered a loss through definite acts on the part of the Government" and the Navy Department used the First War Powers Act "to relieve contractors from loss * * * due to obvious errors and mistakes or due to Government action * * *."[6] It was pointed out in the Committee hearings that in some instances the departmental agencies had "been worrying for two or three years as to how they should solve" the problem of according relief.[7]

Senator Lucas, the author of the statute, stated in the Committee hearings that his knowledge of three cases, that of Lake States Engineering Company, Hanover Woolen Mills and Enjay Construction Company, had caused him to become interested in introducing the legislation[8] and upon the floor of the United States Senate he used the Lake States Engineering Company case in support of his argument in favor of the legislation. 92 Cong. R. 9092. The Senate hearings on the Lucas Act affirmatively disclosed that in all three of these cases there had been prior to August 14, 1945 (V-J Day), a determination by the Government agency involved not to accord relief under the contract to the applicant:

(a) With respect to Lake States Engineering Company a letter filed by the company addressed to Senator Lucas disclosed that prior to the close of the war the company

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[6] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Cong. 2nd Sess., on S. 1477, pp. 56, 75.

[7] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Cong. 2nd Sess., on S. 1477, p. 59.

[8] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Cong. 2nd Sess., on S. 1477, pp. 15-21.

had submitted its claim to the office of the Chief of Engineers and there it had been determined that out of a total possible allowance of $248,000 only $25,000 to $30,000 "could be paid under the contract."[9]

(b) With respect to the Hanover Woolen Mills Company the president of the company read into the record a letter he had received prior to August 14, 1945, from the Army which stated: "It is with regret that you are advised that the conclusion reached is that under the facts and circumstances related, there is no authority under the terms and conditions of contract W669, or the procurement regulations to grant your relief. Consequently, the contracting officer has no other alternative but to deny your request."[10]

(c) With respect to the Enjay Construction Company case the company's president testified: "When we asked for relief we were told that since the question of roads was not a part of a written contract and that there was no guarantee in our contract or in the specifications that the roads would be completed by a certain date, the intention was there, the way the Major put it, the intention was there, but we did not guarantee it. As a result, they said, 'The Government cannot legally allow any payment.' "[11]

Surely the President did not intend by his Executive Order to preclude relief in the very cases which had prompted the introduction of the Lucas Act. It is perfectly obvious that the "final action" was intended to refer only to instances of a final determination not to accord relief under the First War Powers Act. The Court of Claims has found as a fact that Respondent did put the War Department on notice of a desire for extra-legal relief and has further found as a fact that although affirmative con-

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[9] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Cong. 2nd Sess., on S. 1477, p. 16.

[10] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Cong. 2nd Sess., on S. 1477, p. 32.

[11] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Cong. 2nd Sess., on S. 1477, p. 40.

sideration was given to the granting of such relief the matter had been referred back for further negotiations and the matter was still undetermined on August 14, 1945. Section 204 of Executive Order 9786 therefore has no application in this case and for this reason the petition for certiorari should be denied.

It is submitted that the correctness of the foregoing conclusion is affirmatively demonstrated by the petition for certiorari herein in which the following admissions appear:

> "(1) The first war time claim, involving two items, centered around Respondent's allegations (a) that the contracting officer had improperly required Respondent to increase its working force and to maintain the force over time, and (b) that the contracting officer refused to give proper credit for excusable delays. * * * The Board's decision with reference to the item for the increased number of workmen and for the unnecessary over time was issued on January 28, 1944 (F. 6, R. 19-20). * * * It went on to state that the Board *did not decide* whether Respondent was entitled to extra-contractual relief under the provisions of the First War Powers Act which permitted amendment or modification of the contract. * * *
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> "(2) * * *
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> "(d) The third claim was based on allegations that the Government had * * * deleted from the contract certain road work * * * . As will appear, the Army dealt with this claim in two separate ways: First, as a claim for breach of contract, and, second, *as a claim for extra-contractual relief under the First War Powers Act.* * * *
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> "While the appeal was pending negotiations were instituted by the Army for the compromise of this claim. (F. 9, R. 22-23). These negotiations proceeded to a point where the Respondent signed and sent to the Army for final approval a proposed supplemental agreement, designated 'Modification No. 47', which recited that it was executed under the First War Powers Act and 'would facilitate the prosecution of the war,' as required by that Act (F. 10, R. 23). However, higher

echelons of the Army disapproved the proposed agreement. At the same time, the contracting officer was instructed *to negotiate further* with a view to seeking a compromise * * * (F. 10, R. 23). Respondent, however, *continued to seek a renegotiation of the whole contract.* The contracting officer insisted that any modification be limited to the deleted part of the work (F. 10, R. 23).

" * * * Respondent's request for a modification under the First War Powers Act, if such a request was made (the Court of Claims has found as a fact that it was) had borne no fruit by V-J Day, August 14, 1945." (Petitioner's Brief pp. 3-6.)

As the foregoing interpretation of the Court of Claims' findings of fact by Petitioner demonstrates, instead of the claim for extra-legal relief having been finally determined it was referred for further negotiation and no final disposition had been made by August 14, 1945.

Petitioner's brief contains the following further admissions:

" * * * Despite the Army's hint that First War Powers Act relief might be available, Respondent took no action for periods ranging from almost seven to nine months before the end of hostilities. The Army took no further action; and we think that its denial of the claims, taken together with its unaccepted hint to Respondent, amounts to a holding by it that, unless Respondent took further steps, the administrative action was final. (The Army had had the matter under consideration for more than two years. No time limit was put on Respondent for further steps, nor has any period of limitation been cited.)

"The situation is similar with respect to the road work claim. Negotiations had taken place for settlement of this claim, and we think it clear that the Army's rejection of the proposed 'modification No. 47' constituted final action, *unless Respondents renewed request for negotiations reopened the claim.* But we think that the Army's insistence that any negotiations be confined to the road claim, in the face of Respond-

ents' request for reconsideration of the entire contract made it clear that as a practical matter no further action would be taken."[12] (This is a far cry from having taken further action which would constitute a final disposition.)

There is no dispute in this case but that the Army had under consideration relief under the First War Powers Act, and there is nothing whatsoever in the record to show final action under the First War Powers Act prior to August 14, 1945. That is the only type of final action that would make Section 204 of the Executive Order applicable. Therefore the basis for Petitioner's application for certiorari falls.

B. The Inapplicability of Section 307 of the Executive Order

In applying for certiorari Petitioner has placed some reliance upon Section 307 of the Executive Order; however, it is difficult to comprehend in what respect Petitioner considers this portion of the Executive Order to be involved. The pertinent part of the Executive Order is as follows:

> "Sec. 307. Relief with respect to a particular loss claimed shall not be granted * * * unless *the war agency considering the claim* finds, * * * that relief would have been granted under the First War Powers Act, 1941, if final action with respect thereto had been taken by the war agency on or before August 14, 1945."

The Court of Claims disposed of this portion of the Executive Order with the following finding of fact:

> "Neither the War Contract Hardship Claims Board nor any other representative of the War Department made any finding with respect to whether relief would have or would not have been granted under the First War Powers Act, 1941, if final action with respect to plaintiff's claims had been taken by the War Department on or before August 14, 1945." (F. 17, R. 28).

[12] Petitioner's Brief, pp. 18-19.

It is perfectly apparent that the foregoing part of the Executive Order was not applicable to Respondent's case before the Court of Claims, and affords no basis for the granting of certiorari herein, for the following reasons:

(1) The Executive Order by its express terms applies to the "war agency considering the claim". It was obviously intended as a limitation applicable to the war agency, such limitation to come into play only in the event that the war agency decided to allow relief under the Lucas Act. Neither by its terms nor by logic would it have any application in the event the war agency decided, as it did in the case at bar, to deny relief under the Act. It cannot be imagined, unless the war agency was using the Executive Order as a basis for denying relief, that it would when denying the claim upon another ground further find whether it would or would not have accorded relief had action been taken prior to the date in question.

(2) Under the statute the Executive Order obviously could have no application when an appeal is taken to the Court of Claims. Section 6 of the Lucas Act, as amended (62 Stat. 869, 992), provides:

> "Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition in the Court of Claims * * * asking a *determination by the Court of the equities involved* in such claim; and upon the filing of such a petition, the Court, sitting as a Court of Equity, shall have *jurisdiction to determine the amount*, if any, *to which such claimant may be equitably entitled* * * * and to enter an order directing such department or agency to settle the claim *in accordance with the finding of the Court* * * *."

The foregoing statute by its express terms provides for a de novo determination by the Court of Claims and vests in it full jurisdiction to determine the matter in accordance

with its own findings. Obviously the President never intended by his Executive Order to attempt to limit the authority of the Court of Claims because of a failure of the war agency to make an immaterial finding of fact, which finding could not in any sense of the word have been binding upon the Court of Claims. It is equally obvious that the President never intended to impose upon the Court of Claims the burden of making a completely speculative finding as to what the war agency would or would not have done had it acted prior to the date in question.

Petitioner herein has applied for certiorari solely on the basis of the importance of this Court passing upon the validity of Sections 204 and 307 of the Executive Order. Since it is obvious that should the writ be granted this Court would have to hold that the portions of the Executive Order relied upon are not applicable to the case at bar the petition is without foundation and should be denied.

II.

The Provisions of the Executive Order Relied Upon Are So Patently in Conflict With the Statute That Their Invalidity is Obvious.

In the event the Court disagrees with Respondent's position that under the undisputed facts as found by the Court of Claims Sections 204 and 307 of the Executive Order are not applicable, then Respondent says that these provisions of the Executive Order are so patently in conflict with the statute that their invalidity is obvious, and there is not sufficient doubt about the matter to warrant the granting of the petition for certiorari. It should be pointed out that the Court of Claims is not alone in striking down Sections 204 and 307 of the Executive Order; numerous other Courts have held to the same effect. *Warner Construction Co.* v. *Krug*, 80 F. Supp. 81 (D.D.C. 1948); *Stephens-Brown, Inc.* v. *United States*, 81 F. Supp. 969 (W.D. Mo. 1949); *Pittston-Luzerne Corp.* v. *United States*, 84 F. Supp. 800 (M.D. Pa. 1949); *McGann Mfg. Co.* v. *United States*, 98 F. Supp. 225

(M.D. Pa. 1951); *Kimbrough, Trustee* v. *United States,* Civil No. 1968 (E.D.S.C. May 10, 1950, unreported). The Court's opinion in *Warner Construction Co.* v. *Krug,* supra, 83-84, well illustrates the approach taken by other Courts:

> " * * * The bill as originally introduced contained a proviso that it should not be applicable to claims submitted under the First War Powers Act, which had been finally disposed of prior to August 14, 1945. It is significant that this proviso was stricken from the measure in the course of its passage and the last clause of Section 3 was inserted, affirmatively providing that a previous settlement under the earlier statute would not operate to preclude further relief otherwise allowable under the Act.
>
> "This legislative history throws an illuminating light on the intent of Congress and accentuates the clear meaning of the last clause of Section 3. It is manifest that it was the intention of Congress that a prior settlement under the earlier statute should not operate to preclude the granting of further relief under the 1946 Act.
>
> "With the policy or expediency of this legislation, the Court has no concern. It is the duty of the Court to apply the statute as it is written, in view of the fact that it is unambiguous.
>
> "In so far as Sections 204 or 307 of the rules and regulations promulgated under the Statute may be inconsistent with Section 3 of the Act, these regulations must be deemed invalid. It is elementary law that executive regulations promulgated for the purpose of carrying a statute into effect must be within the frame work of the Act and may not be inconsistent with the statute."

Respondent now presents for the separate consideration of the Court the two questionable Sections of the Executive Order.

A. The Invalidity of Section 204 of the Executive Order

The language of Section 204 is as follows:

> "No claim for loss * * * shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; and *no claim shall be considered if final action with respect thereto was taken on or before that date.*"

Petitioner places its reliance upon that part of the regulation which is italicized above. It is the position of Respondent that this portion of the Executive Order is invalid for the following reasons:

(1) The limitation contained in the Executive Order with respect to claims on which final action had been taken prior to August 14, 1945, is predicated upon a portion of the Lucas Act as originally introduced but which was deleted by Congress before passage. The bill as originally introduced contained the following proviso:

> "Provided further, that this Section shall not be applicable to cases submitted under Section 201 of the First War Powers Act, 1941, which have been finally disposed of under such Section upon their merits prior to August 14, 1945."

This proviso did not remain in the statute but was eliminated. It is a familiar rule of statutory construction that Congress will not be deemed to have left in by implication that which it expressly eliminated. *Pennsylvania Rr. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 198 (1913); *Carey* v. *Donohue*, 240 U. S. 430, 436 (1916).

(2) The Executive Order conflicts with the clear and unambiguous provisions of the statute as passed. Section 3 of the statute as passed is as follows:

> "Claims * * * shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945,

> *but a previous settlement under the First War Powers Act, or the contract settlement act of 1944 shall not operate to preclude further relief* otherwise allowable under this act."

There can be no better evidence of Congressional purpose than the clear and unambiguous language of the statute. It is a well established rule that where legislation is plainly expressed no room is left for construction. *United States* v. *Lexington Mill Co.*, 232 U. S. 399, 409 (1914); *Thompson* v. *United States*, 246 U. S. 547, 551 (1918). If Congress had intended the limitation contained in Section 204, why did it not leave the original proviso in the Act? This would have been the obvious way for the accomplishment of such a purpose.

(3) The legislative history of the Lucas Act clearly demonstrates that the limitation with respect to claims previously acted upon was purposely eliminated. There is grave doubt as to the value of resorting to legislative history. As Mr. Justice Jackson, in an article entitled "The Meaning of Statutes: What Congress Says of What the Court Says", appearing in 34 American Bar Association Journal 535, states:

> "I, like other opinion writers, have resorted not infrequently to legislative history as a guide to the meaning of statutes. I am coming to think it is a badly overdone practice, of dubious help to true interpretation and one which poses serious practical problems for a large part of the legal profession. * * *
>
> "And, after all, should a statute mean to a Court what was in the minds but not put into the words of the men behind it, or should it mean what its language reasonably conveys to those who are expected to obey it."

Respondent says that since the language of the Lucas Act here involved is clear and unambiguous that it is improper to resort to extrinsic evidence of its meaning. *United States* v. *Lexington Mill Co.*, 232 U. S. 399, 409 (1914);

Thompson v. *United States*, 246 U. S. 547, 551 (1918). Respondent says that if the legislative history is to be resorted to such history must be considered in its entirety. Petitioner in this case has relied principally upon brief committee reports, general in nature, which Respondent says are entirely misleading. The true purpose behind the Lucas Act cannot be understood without a careful reading in its entirety of the legislative hearing upon the statute.[13]

A major part of the statute had its origin in these hearings. The statute as originally introduced simply authorized war agencies to amend or modify contracts when necessary to prevent a manifest injustice and limited the relief to cases of services or materials furnished between December 7, 1941, and August 14, 1945, provided the case had not previously been disposed of upon its merits under the First War Powers Act prior to V-J Day. Because of the Committee hearings the test of "manifest injustice" was changed to "equitable claims * * * incurred * * * without fault or negligence".[14] The idea of a Court review originated in the hearings,[15] as did the limitation that the recovery should be limited to the contractor's net loss upon all Government contracts, i.e., profit from one contract should be credited against the loss upon another.[16] Because of evidence presented the date within which the claimed loss had to be incurred was moved back from December 7, 1941, (the date of declaration of war), to September 16, 1940, (the date of passage of the Selective Service Act).[17] The Committee hearings make it abundantly clear that the limitation of the original bill that it should not apply to cases "finally disposed of under such section (Section 201, First

[13] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477.

[14] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477, pp. 27-28, 35.

[15] Hearings Before a Sub-committee on the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477, p. 29.

[16] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477, p. 30.

[17] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477, pp. 24-25.

War Powers Act) upon their merits prior to August 14, 1945," was intentionally removed. This conclusion is inescapable because of the following developments in the Committee hearings:

(a) The limitation was fully considered. For example, it was pointed to by every representative of the Government who commented upon the bill.[18]

(b) The limitation was specifically critized by the Navy Department. The Acting Secretary of the Navy submitted a letter in which he commented as follows:

> "There is also no time limit for the presentation of the claims, the only limitation being that the section is not applicable 'to cases submitted under Section 201 of the First War Powers Act, 1941, which have been finally disposed of under such Section upon their merits prior to August 14, 1945.' It would be difficult to determine what cases are covered or excluded under such provision, as few applications have been submitted by contractors with specific reference to Section 201 of the First War Powers Act. Also it would generally be impossible to determine what cases have been 'fully disposed of upon their merits prior to August 14, 1945.' The only sure test of final disposition is payment in full, * * *."[19]

(c) It was specifically testified by a representative of the General Accounting Office that the limitation contained in the original bill would probably preclude relief in some of the very cases which were responsible for the origin of the proposed legislation. His testimony was as follows:

> "I would question whether in one or two of the situations presented by Senator Lucas, the relief would be forthcoming if this bill should be enacted. There

[18] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477; Attorney General p. 2, Navy Department pp. 3, 4 and 5, War Department p. 5, Maritime Commission p. 7, General Accounting Office p. 28.

[19] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477, pp. 4-5.

was some dispute in the War Department in the case of the Hanover Woolen Company, and *even when they had the opportunity to grant relief under the First War Powers Act, the Department decided not to grant* relief. * * *

" * * *

"Then, the provisions of the bill are not to be applicable to cases finally disposed of on their merits under Section 201 of the First War Powers Act prior to August 14, 1945. *This provision would seem to exclude many cases which* presumably, if they had any merit, were *determined prior to that date, and might leave rather a small area upon which the bill could operate.* However, there is a question as to the meaning of the language 'when finally disposed of.'

" * * *

"In other words, if paying more under a contract to a contractor who had no further contracts with the Government were requested, the Department would feel that that was not an aid to the prosecution of the war. * * *

"The Chairman. That is an injustice to one who was called in to render a certain measure of service in furtherance of the war effort?

"Mr. Weitzel. Yes, Senator.

"Senator Revercomb. May I interrupt there to say that I would not want to limit this in furtherance of the war, if the Government went into a contract under authority of law, and through no fault of the contractor he lost money, whether in furtherance of the war effort or peace effort, does not the same principle apply, of right?

"If you hang it upon the question of furtherance of the war, you have put into it another element that may be difficult to prove.

"Mr. Weitzel. I think, too, if you give effect to the provisions of this bill, you will exclude many cases which might be thought meritorious by the contractors *but which were decided adversely to the contractors for this very reason.* * * *.

"Senator Revercomb. Where is the justice in making a distinction in a contract on the ground it is in

furtherance of the war effort, if it is a contract entered into in a bona fide way?

"Mr. Weitzel. I am not sure that there should be a distinction. * * *. That may not be the intended approach under this bill, but the language of the bill has that limitation, that if a case was settled under the First War Powers Act, it could not be reopened now." [20]

Later in the hearing Mr. Weitzel brought out very forcefully on questioning Colonel Holland (the War Department representative) that the language contained in the bill would preclude determination of a number of cases, such questioning being as follows:

"Mr. Weitzel. I do not want to take up the time of the Committee unnecessarily, but I would like to ask about this provision that the section is not to be applicable to cases submitted under Section 201 of the First War Powers Act which have been finally disposed of under such section on their merits prior to August 14, 1945, whether there would be any difficulty interpreting that term 'finally disposed of upon their merits'?

" * * *

"Mr. Weitzel. As to its merits, would you say if the Department granted partial relief that it has been disposed of in regard to its merits?

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[20] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477, pp. 28-29. The testimony of this witness was the dominant factor in shaping the Lucas Act as finally passed. About his testimony the Chairman of the Committee at page 35 of the Hearings made the following statement: "You listened to the representative of the Comptroller General's Office here (referring to Mr. Weitzel) and his comments on the effect of the language of the bill; without committing you in any way, I want to say to you that some of his comments struck me forcibly. In other words, that the very thing that we are seeking to do by this bill might not be done by reason of certain language of the bill."

The Hearings at page 30 disclose that Mr. Weitzel offered assistance in drafting amendments to the Bill, which offer appears to have been accepted. In H. R. Rep. No. 2576, 79th Congress, 2nd Sess., a statement of Senator McCarran made on the Senate floor was adopted and quoted as follows: "The General Accounting Office raised some questions as to the language of the then existing bill * * *. The language was carefully redrafted so as to limit it in every respect and to protect it in every respect. *The language now contained in the Bill is what was approved and is approved by the General Accounting Office.*"

"* * * *

"Mr. Weitzel. Suppose a claimant claims $500,000 and you feel $300,000 would keep him in business, and awarded him that; would that be final?

"Colonel Holland. Yes. Because regardless of how the money was lost we would not want to pay him any more than necessary to keep him in business * * *.

"Mr. Weitzel. That being the case, would that preclude determination of some cases decided on the merits?

"Colonel Holland. *I think it would be precluding to all.*" [21]

It is particularly significant that the statute as passed in addition to eliminating the language about claims upon which action had been taken contained the express provision:

"A previous settlement under the First War Powers Act, 1941, * * * shall not operate to preclude further relief * * *."

Congress, therefore, not only eliminated the limitation, it also enacted an express provision to the contrary.

(d) Further evidence that the limitation was intentionally dropped from the statute appears from the fact that, as heretofore pointed out in this brief, in all three of the cases which Senator Lucas stated had caused him to introduce the bill there had been prior to V-J Day a determination by the war agency not to grant relief under the contract,[22] and in at least one of these cases it appears that there had been a determination not to accord relief under the First War Powers Act.[23]

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[21] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477, pp. 61-62.

[22] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477; Lake States Eng. Co. p. 16; Hanover Woolen Mills Co. p. 32; Enjay Const. Co. p. 40.

[23] At page 42 of the Hearings it is disclosed in the testimony of the President of Enjay Construction Company that after their claim was first turned down it was presented a second time under the First War Powers Act. About this second presentation he testified: "So then, the District Engineer's Office took the position, 'well, under the

In addition to the three cases brought up by Senator Lucas the Committee during the Hearing gave consideration to six others. Of these six the record of the Hearing definitely discloses that four had been turned down under the First War Powers Act prior to V-J Day,[24] the fifth had been turned down but the record is not clear as to whether the denial was under the First War Powers Act,[25] and the record is not clear as to the status of the sixth.[26]

The Committee was impressed with the equities of the cases brought before it and left no doubt but that its purpose was to enact legislation that would afford relief. The following statements by the Chairman appear in the record:

> "I imagine there will be a number of cases that have not been brought to the attention of anybody. This is broad legislation." [27]
>
> " * * * I think that those who meritoriously contributed to the war effort should not be permitted to lose. * * * " [28]
>
> "In other words, we are now trying to enact a bill, and will we have to interpret that bill also, and will the War Department have to interpret that bill, or shall we make it so plain that it will lay the road wide open for the War Department to render justice in a

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First War Powers Act let us prove that you are important to the war effort.' * * * So they decided to prepare a brief that would indicate that we are important to the war effort. * * * So when the case finally came up to the ASF, again it was *denied on the premise that there was no contractor important enough to pay $215,000 to keep him in business*, if someone else probably could do the work that we were doing." "The chairman. When was that decision arrived at?" "Mr. Wagner. That was in the early part of 1945, *before the war closed.*"

[24] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477: McGann Mfg. Co. Inc. claim, pp. 51-52; Wullschleger Co. claim, p. 11; Shank Metal Products Co. claim, p. 12; Merimac Mills claim, p. 25.

[25] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477: Davis Construction Co. claim, pp. 45-46.

[26] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477: Claim of F. G. Vogt & Sons, Inc. p. 82.

[27] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477, p. 24.

[28] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477, p. 44.

given case? That is the thing that I have in mind, on account of the statements made to us yesterday here by the representative of the Comptroller's office."[29]

"We have had a number of cases. That is more than three, and it does seem to me that those cases, and others like them, may present a situation where if the merits are as stated some opportunity for relief on the merits should be granted * * *."[30]

"All the Government wants to do is deal fairly with those who aided the Government in its great struggle."[31]

Respondent submits that it is impossible to read the record of the Committee hearings without reaching the conclusion that the omission of the limitation with respect to claims upon which action had been taken was deliberate, and the interpretation which Petitioner seeks to place upon the statute is foreign to the law—in fact, even in conflict with the express wording of the statute and the recorded purpose behind it.

(4) It is interesting to note that Petitioner is admittedly attempting to defend the Executive Order in this case as a lawful delegation to the Chief Executive of *legislative* power.[32] It cannot be seriously argued that the Executive Order does not impose limitations that are not contained in the statute. The authorities leave no doubt but that a delegation of legislative power of the type contended for by Petitioner would be unlawful. *Lynch* v. *Tilden Co.*, 265 U. S. 315, 320-22 (1924); *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610 (1930); *Miller* v. *United States*, 294 U. S. 435, 439 (1935); *Manhattan General Equip. Co.* v. *Commissioner*, 297 U. S. 129, 134 (1936); *Helvering* v. *Credit Alliance Corp.*, 316 U. S. 107, 112 (1942); *Helver-*

[29] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477, p. 50.

[30] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477, p. 65.

[31] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 79th Congress, 2nd Sess., on S. 1477, p. 66.

[32] Petitioner's Brief p. 15.

ing v. *Sabine Transportation Co.*, 318 U. S. 306, 311 (1943). In *Manhattan General Equip. Co.* v. *Commissioner*, supra, at page 134, this Court said:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

In the event Congress desired to impose the limitation with respect to claims finally disposed of it alone had the power to do so; such legislative power could not be lawfully delegated to the President.

B. The Invalidity of Section 307 of the Executive Order

In considering the validity of Section 307 of the Executive Order it will be of considerable benefit to contrast the Executive Order with the statute. Section 307 of the Executive Order provides:

> "Relief with respect to a particular loss claimed shall not be granted * * * unless the *war agency* considering the claim finds, * * * that relief would have been granted under the First War Powers Act, 1941, if final action with respect thereto had been taken by the war agency on or before August 14, 1945."

The statute, as applicable to this case, provides:

> "Whenever any Claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with the Court of Claims * * * asking a *determination by the Court of the equities involved* in such claim; and upon the filing of such a petition, the Court, sitting as a Court of Equity, shall have *jurisdiction to determine the amount if any, to which*

> *such claimant and petitioner may be equitably entitled;* and to enter an order directing such department or agency to settle the claim in accordance with the finding of the Court; * * *."

It will be noted that whereas the Executive Order by its express terms applies to the war agency the Petitioner is attempting to make the same applicable to the Court of Claims. This certainly imposes an impossible burden upon the Court of Claims, and "legislates" into the statute a condition not contained therein. Such attempted legislation is obviously improper. As this Court said in *Helvering* v. *Credit Alliance Corp.*, 316 U. S. 106, 113 (1942):

> " * * * We think * * * that the regulation not only was contradictory of the plain terms of the sub-section but attempted to add a supplementary legislative provision, which could only have been enacted by Congress."

It is submitted that Petitioner has no basis whatsoever for complaint insofar as Section 307 of the Executive Order is concerned for although the Court of Claims is not bound by such Section it has clearly applied the spirit of the Section. It must be remembered that whether relief would or would not be accorded under the First War Powers Act was largely a matter of discretion. The people who would have exercised that discretion in 1945 cannot be reassembled now. The Court of Claims in no uncertain terms has found that Respondent did apply for the type of relief awarded under the First War Powers Act, that its requests were sufficient to apprise the War Department that it was being asked to grant extra-legal relief, that the War Department had prior to V-J Day gone so far as to have Respondent execute a contract to accept relief under the War Powers Act, that the War Department subsequently decided not to consummate the agreement but returned it for further negotiations, and that the matter was still undetermined on V-J Day. When the War Department was negotiating with

Respondent it was certainly determining "the equities" in the case. Under the appellate provision of the statute hereinabove quoted full jurisdiction to determine such equities is by the statute vested in the Court of Claims. The Court of Claims has found: "Plaintiff is equitably entitled to the sum of $59,768.42 in settlement of its claim." (R. 35.) It is submitted that the findings of the Court of Claims are fully in accord with the statute and the spirit of the Executive Order.

III.

The Questions Involved Are Not of Sufficient General Importance to Warrant the Granting of the Writ.

Petitioner in its application seeks to give the impression that the issues here involved are of grave public concern. Respondent says that this is not so. Although the Lucas Act was enacted more than six years ago it has never rated sufficient prominence to be recorded as anything more than a footnote in the U. S. Code. See 41 U. S. C. 106 Note. The statute expressly provides "claims for losses shall not be considered unless filed within six months after the date of approval of this Act", thus the time has long since expired within which claims under the Act may be filed. According to the record of hearings held in the United States Senate in May and June, 1949, almost three years after the passage of the Act, *only one claim* had then been paid by the war agencies under the statute.[33] Certainly by that date all of the claims under the Act should have been processed by the agencies. According to the Government's Petition for Certiorari (p. 9) there are now 48 Lucas Act cases pending in the Court of Claims and 13 in the District Courts. According to the reported decisions the case at bar and *McGann Manufacturing Co.* v. *United States*, 98 F. Supp. 225 (1951), are the *only cases* in which the Court of Claims or any other Court has rendered a judgment against

[33] Hearings Before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 81st Cong. 1st Sess., on S. 873 and H. R. 3436, p. 2.

the Government under the statute. Certainly to date the Government's "batting average" is good and its "cry of wolf" is premature.

Petitioner says that the Court of Claims has interpreted the Lucas Act in such a manner as to take the element of risk of loss out of Government contracts. This is obviously not true. The statute by its express terms is limited to "equitable claims * * * incurred * * * without fault or negligence." The Court of Claims has so interpreted and applied the statute. This is the same type of relief that was granted under the First War Powers Act. For example, the Navy Department's directive on the subject provided:

> "Third, fair and honest treatment of war contractors will assist in inducing wholehearted cooperation on the part of such contractors, and applications for amendments or modifications without consideration to relieve contractors from loss * * * due to obvious errors and mistakes or due to Government action may be regarded with liberality in respect of contractors essential to the war effort."

Respondent's claims and its oral evidence were all to the effect that its loss was due to Government errors, mistakes and action and the Defendant (Petitioner) *did not offer a scintilla of evidence to the contrary.* Nor did it ever advance the contention that Respondent's loss was due to its own fault or negligence.

This Court has previously construed the Lucas Act, *Fogarty* v. *United States*, 340 U. S. 8 (1950), and there laid down a completely workable rule which adequately protects the Government, such rule being:

> "* * * No particular form of notice is required. But whatever the form of notice, it must be sufficient to apprise the agency that it was being asked to grant extra-legal relief under the First War Powers Act for losses sustained in the performance of war contracts."

The Court of Claims has religiously followed that rule. It has in numerous instances used the rule of the *Fogarty case* to deny relief to claimants. *Pennington* v. *United States,* 118 C. Cls. 610, 95 F. Supp. 817 (1951); *General Casualty Co.* v. *United States,* 121 C. Cls. 200, 101 F. Supp. 753 (1952); *Simpson* v. *United States,* 121 C. Cls. 506, 102 F. Supp. 562 (1952), cert. den. 344 U. S. 816 (Oct. 13, 1952); *Depew Paving Co.* v. *United States,* 122 C. Cls. 151, 104 F. Supp. 94 (1952), cert. den. 344 U. S. 854 (Oct. 20, 1952); *Owens* v. *United States,* — C. Cls. —, 104 F. Supp. 1015 (1952). Other Courts have held to the same effect. *Davidson* v. *United States,* 185 F. (2d) 897 (Apps. D. C. 1950); *Evans* v. *United States,* 101 F. Supp. 436 (E.D. Mo. 1951). As hereinabove noted, the case at bar and the *McGann* case are the only cases in which any Court in a reported decision has rendered a judgment against the Government under the Lucas Act. Petitioner's statement that it can win all of its Court of Claims Lucas Act cases and ten of the thirteen District Court cases with Section 307 of the Executive Order and thirty-two of the Court of Claims cases and eleven of the District Court cases with Section 204 of the Order goes too far. This means that there have been only two[34] cases in the entire United States which under the Executive Order were entitled to recover, and in the event of any overlapping of the defenses possibly none. This argument in and of itself proves the conflict between the Executive Order and the statute. Certainly Congress did not go to the trouble of holding lengthy hearings and passing a statute for the benefit of only two claimants. If this had been its purpose it obviously would have resorted to private bills.

[34] In the McGann case, the Executive Order was held invalid and the Government did not appeal. It is difficult to reconcile this with Petitioner's present position.

CONCLUSION

This case depends primarily upon its own facts and was correctly decided below. The Executive Order relied upon is not applicable; if applicable, it is invalid. The petition should be denied.

Respectfully submitted,

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